United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

75-4087

B/P's

United States Court of Appeals For the Second Circuit

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,
Petitioner,

-against-

SECURITIES AND EXCHANGE COMMISSION, RAY GARRETT, JR., PHILIP A. LOOMIS, JR., JOHN R. EVANS, A.A. SOMMER, JR., GEORGE A. FITZSIMMONS,
Respondents.

PETITION FOR A REHEARING AND SUGGESTION THAT THE REHEARING BE EN BANC

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PRELIMINARY STATEMENT

This case brings before this Court a petition for review of an order of the Securities & Exchange Commission ("S.E.C.") dated April 28, 1975 which revoked the broker dealer registration of Samuel H. Sloan & Co. ("Sloan & Co.") and barred Samuel H. Sloan ("Sloan") from being associated with any broker or dealer. See Samuel H. Sloan, Securities Exchange Act Release No. 11376 (April 28, 1975), 6 SEC Docket 772. The petition was denied in an opinion which dealt with this and another petition brought by the same petitioner. Sloan v. S.E.C., slip op. 555 (2d Cir. Nov. 18, 1976). The petitioner now petitions for a rehearing and suggests that the rehearing be en banc.

POINT I

THE STATEMENT IN THE OPINION OF THIS COURT THAT AN INJUNCTION IS IN ITSELF A SUFFICIENT GROUND TO SUPPORT THE REVOCATION OF A BROKER DEALER LICENSE IS ~~CLEARLY~~ ERRONEOUS AND REQUIRES A WITHDRAWAL OF THIS COURT'S OPINION

This Court's opinion contains a glaring misstatement of the law where it says:

> "Each of these injunctions was in itself a sufficient ground to support the revocation of Sloan's broker dealer license under Section 15(b) 5 c of the 1934 Act." slip op. at 558

This statement of the law is incorrect. It is clear that the

ason the court made a mistake on this point is that the brief of the

E.C., p. 3 n. 1, which purports to quote the law, substitutes in two

aces three little dots for certain key words in such a way as to create a

sleading impression of what the statute says. The full and correct quo-

tion of the statute would be:

> (5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated --
>
> > (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.
> >
> > (D) has wilfully violated any provision of the Securities Act of 1933, or of the Investment Advisers or of this chapter, or of any ruler or regulation under any of such statutes.

The brief of the S.E.C, however, quotes the law by stating the following:

> "In this regard, Section 15 (b) (5) provided, inter alia, that the "Commission shall . . . suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds . . . that such broker or dealer . . . (C) is permanently or temporarily enjoined by . . . any court of competent jurisdiction . . . from engaging in or continuing any conduct or practice in connection with any . . . [activity as a broker or dealer or] (D) has willfully violated any provision of . . . [Securities Exchange Act or of the rules promulgated by the Commission thereunder]."

From this it can be seen that the S.E.C., in filing its brief,

laced ". . ." where the law says "after appropriate notice and opportunity

for hearing" and at a later point again placed "..." where the law says "If it finds that such censure, denial, suspension or revocation is in the public interest. . . ."

Clearly, once the law is read correctly, it can be seen that an injunction in itself is not sufficient grounds to support the revocation of a broker dealer registration. There are three additional required elements which are (1) notice, (2) the opportunity for a hearing and (3) a finding by the S.E.C. that the revocation is in the public interest. None of these three elements are present in this case and hence the opinion of this court must be reversed.

There is a further problem with this court's opinion in that Section 15(b) 5 c, which this court cites, was amended and renumbered on June 4, 1975. The relevant section is now numbered Section 15(b) 4 c. The present section 15 (b) 5 deals with the withdrawal of the registration of a broker dealer which concerns another statutory issue involved in this case. See slip op. at 556.

The S.E.C. contends that the June 4, 1975 amendments are irrelevant since the order of the S.E.C. was issued on April 28, 1975 which was before the amendments became law. However, regardless of whether the pre or post-amendment version of the law is deemed to govern, the three elements of (1) notice, (2) hearing and (3) a finding of public interest are required before an injunction can form the basis of a revocation.

The requirement that there be a finding of public interest has been noted in prior judicial opinions. For instance, in Jaffee & Co. v. S.E.C., 446 F. 2d 387, 394 (2d Cir. 1971) this court stated:

> "Had Jaffee & Co. been afforded adequate notice, it would have had an opportunity, both to take action to lessen the attractiveness of invoking derivative sanctions and to introduce evidence before the hearing examiner tending to show that the use of such sanctions would not have been in the public interest. These opportunities were totally denied by reason of the course adopted in the notice and at the commission's hearing."

The decision of the S.E.C. in this case which came down on April 28, 1975 had a section which was labeled "public policy or interest served". However, the petitioner's brief which was filed in this court argued, inter alia, that since nothing discussed in that section was supported by or even alluded to in the 1286 page record of the proceedings before the S.E.C., the findings of the S.E.C. regarding "public interest" were not supported by substantial evidence and hence must be set aside and therefore since a finding of public interest is an essential element in an S.E.C. disciplinary proceeding, the orders of the S.E.C. must be vacated in their entirety. However, this court bypassed this entire argument by its erroneous ruling that an injunction in itself is a sufficient ground to support the revocation of a broker dealer license.

That section of the S.E.C.'s opinion which dealt with "public policy or interest served" was entirely devoted to a discussion of the very injunctions cited in this court's opinion and with related court proceedings.

The S.E.C. set forth its version of the terms of a preliminary injunction issued by Judge Ward on January 17, 1975, in an action instituted by the S.E.C. on December 30, 1974, and quoted at length from papers filed by Sloan in this Court in a motion for a stay of

that injunction and in a prior petition for a writ of mandamus which asked this court to disqualify Judge Ward from proceeding further. See Sloan v. Ward, Dkt. No. 75-3001 (2d Cir. January 14, 1975). In discussing these court filings, the opinion of the S.E.C. stated:

> "Sloan's own papers in the second injunctive suit show his continuing disposition to disregard or defy the rules governing registered broker-dealers."

The S.E.C. conducted that because of events which occurred in late 1974 in connection with the filing of the S.E.C.'s second injunctive suit and because of statements made in motion papers and in briefs filed in this Court, it was in the "public interest" to revoke the broker dealer registration of Sloan & Co. and to bar Sloan for life from being associated with any broker dealer.

It is time that the papers filed in this Court, from which the decision of the S.E.C. quoted, were highly critical of both Judge Ward and the S.E.C. At the same time, these court filings violated no law. Clearly, it will have a chilling effect on litigants who wish to advocate a position in the United States Court of Appeals for the Second Circuit if statements made in an adversary contest which are critical of a government agency and of a United States District Judge can be held against a litigant in an unrelated proceeding before the same government agency. On this alone, the decision of the S.E.C. should be reversed. It should be noted that not only did the decision of the S.E.C. devote as much space to these court filings as it did to an earlier section dealing with its findings of violations of the S.E.C. record keeping rules, but the court filings were further emphasized by the S.E.C. attorney when this case was argued orally before this Court.

However, all this should not suffice to overlook the important point that the petitioner did not have prior notice that either of the court filings or the preliminary injunction issued by Judge Ward on January 17, 1975 or the prior permanent injunction issued by Judge Ward on January 7, 1974 were going to form the basis for the penalties imposed by the S.E.C. on April 28, 1975. This brings on the next point in this petition for a rehearing.

POINT II

THIS COURT MAKES AN ERROR OF FACT AND OVERLOOKS A KEY POINT IN THE PETITIONER'S ARGUMENT THAT HE WAS NOT AFFORDED ADEQUATE NOTICE AND THE OPPORTUNITY FOR A HEARING.

The opinion of this Court concludes that Sloan was afforded adequate notice. However, in arriving at this result, the Court misstates the fact. Once an error in the facts is corrected, Sloan's lack of notice is obvious.

The factual error comes at the point the Court discusses various injunctive suits instituted by the S.E.C. against Sloan. It states that in the first suit, the S.E.C. obtained a preliminary injunction from which Sloan appealed and this appeal was dismissed. This is not correct. It is true that the S.E.C. did institute a lawsuit and obtained a preliminary injunction against Sloan. However, this injunction, which was dated June 24, 1971, was entered by consent and without admitting or denying the charges. Sloan did not appeal from this injunction. The second injunction, from which Sloan did appeal, was dated January 7, 1974, however, Sloan did not have notice that the second injunction would form the basis for administrative penalties. This is obvious from the following facts. The three page order for public proceedings, which this Court discusses in its opinion, was issued by the S.E.C. on April 24,

1972. Thereafter, an administrative hearing was conducted by the S.E.C. from October 30, 1972 to November 1, 1972. These facts are discussed briefly in S.E.C. v. [illegible] Sloan & Co., 369 F. Supp. 994 (S.D.N.Y. 1973). There were no administrative hearings after November 1, 1972 and nothing of an evidentiary nature was introduced into the record following that date. As noted previously, the decision of the S.E.C. did not come down until April 28, 1975. In other words, the S.E.C. waited for two and one half years after all hearings had been concluded and more than three years after the order for public proceedings had been issued before its order of April 28, 1975. More than half of the decision of the S.E.C. issued on April 28, 1975 deals with circumstances which arose in 1973, 1974 and 1975 including the two injunctions and the court filings just cited. Obviously, the order for Public Proceedings dated April 25, 1972 did not and could not have informed Sloan and Sloan & Co. of the events which occurred in 1973, 1974 and 1975 which formed most of the basis for the S.E.C.'s decision. The S.E.C. itself demonstrated the importance of these subsequent events by stating in its decision that it gave "weight" to the existance of the second injunctive suit in imposing sanctions (A57) and by stating:

> "Here we have facts and circumstances before us that were unknown to and could not possibly have been foreseen by our staff at the time of the settlement talks [which occurred prior to the hearing in Oct. - Nov. 1972] (A56 n. 24)."

It should be obvious that if the staff of the S.E.C. did not know and "could not have foreseen" the "facts and circumstances" which formed the basis for the S.E.C.'s imposition of sanctions, then Sloan did not know and could not have foreseen these facts and

circumstances either. Therefore, it is obvious that Sloan did not have adequate notice and hence the order of the S.E.C. must be set aside.

It should be observed that the brief for the S.E.C. p. 13, defends what it did in this case by citing a more recent decision, International Shareholders Services Corp[illegible]ion, 9 SEC No. 16,820 (June 8, 1976) where it stated that th[illegible].E.C. properly considered:

> "[d]emonstrated misconduct found in other proceedings before us, before the courts, or before the securities industry's self-regulatory bodies."

In effect, the S.E.C's position in this regard is that it can take judicial notice of other proceedings, such as the two court injunctions which were issued long after the hearing in the instant case, without giving a respondent such as Sloan and Sloan & Co. either notice or a hearing. What this all boils down to is that the S.E.C. claims that any time it obtains an injunction is a United States District Court, even by consent and without the defendant admitting or denying the charges, it can use that injunction as a basis for the imposition of administrative penalties without (1) notice (2) an opportunity for a hearing (3) an independent finding of public interest. All doubt that this is how the S.E.C. is interpreting Section 15(b) of the Securities Exchange Act should be erased by its recent decision in the Matter of C.R. Richmond & Co., Securities Exchange Act Release No. 12535 (June 10, 1976), 9 S.E.C. Docket 846, which cited the S.E.C.'s decision in the instant case and elaborated further on this point.

As was demonstrated in Point I of the instant petition the S.E.C.'s rather free interpretation of Section 15(b) has now been affirmed by this Court's opinion to the effect that the S.E.C. need not

afford notice and the opportunity for a hearing prior to imposing administrative penalties in cases where an injunction has been issued. This holding is erroneous and reversal of this Court's opinion is required.

POINT III

THIS COURT OVERLOOKED THE POINT THAT THE LIFETIME BAR IMPOSED BY THE S.E.C. IN THIS CASE IS A PENALTY MORE SEVERE THAN THAT PERMITTED BY STATUTE AND MOREOVER IS A PENALTY WHICH UNDER THE CONSTITUTION MAY NOT BE IMPOSED BY AN ADMINISTRATIVE AGENCY WITHOUT A JUDICIAL TRIAL.

Prior to the June 4, 1975 amendments, Section 15(b) 7 authorized the S.E.C. to ". . . bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer . . ."

The petitioner contends that this wording displays a congressional intent to empower the S.E.C. to bar for a period not exceeding one year and since more than one year has passed since April 28, 1975, the order of the S.E.C. must be vacated. The S.E.C. however, contends that this section authorizes the S.E.C. to impose a lifetime bar and it has imposed such a bar in the instant case.

It should be noted that a lifetime bar has almost never been imposed. In normal cases, the most severe penalty is a bar which contains a provision granting permission to apply to the S.E.C. for leave to become associated with a broker dealer after one year. For instance, in a recent case, In re Amswiss International Corp. and Glenn Woo, CCH Fed. Sec. Law Rep. par. 80,721 (current binder) (September 8, 1976) the recommendation was a 60 day suspension for Amswiss International Corp. and an eighteen month bar for Glenn Woo. These penalties were unusually severe. However, they were based on circumstance arising out of the fact that Amswiss International Corp.

acted as the broker for Ramon D'Onofrio, who has been characterized by this Court as "ubiquiteously criminal". Woo, who was a close friend of D'Onofrio, organized Amswiss International Corp. and sold unregistered shares and manipulated the market in stock of numerous corporations for D'Onofrio's benefit. These facts were admitted by the respondents to that proceeding. In addition, the S.E.C. had obtained two injunctions against these respondents. S.E.C. v. D'Onofrio, 72 Civil 3507 and S.E.C. v. Leonard Cooper, 73 Civil 2508. Nevertheless, a lifetime bar was deemed too severe a penalty.

In another recent and as yet unreported decision, the S.E.C. concluded a proceeding against Edward Jaegerman, who was for many years chief of the Division of Trading and Markets of the S.E.C. There the finding of the S.E.C. was unlawful hypothecation and misappropriation of customer's securities. Jaegerman had previously pleaded guilty in a related criminal case. Nevertheless, the penalty imposed was a one year bar with permission to re-enter the securities industry thereafter.

The instant case is different from those just cited because the S.E.C. has never alleged that any member of the investing public lost a nickel because of the authorities of Sloan and Sloan & Co. The facts of the case presented here involve not wilfull wrongdoing on the part of Sloan but adherence to certain legal positions, which had the effect of challenging the authority of the S.E.C. One of these legal positions was upheld in the latter part of the court's opinion in the instant case.

However, the question presented here is whether the Securities

Exchange Act and the Constitution permit the imposition of the lifetime bar imposed in the instant case. The constitutional aspect of that question is answered in United States v. Lovett, 328 U.S. 303, 314-318 (1946) where the Supreme Court established that a disbarrment penalty of this sort is punishment which cannot be imposed without a speedy judicial trial with a right to a jury. The case law which arose from this decision was dismissed recently in Paul v. Davis, 424 U.S. 693 703 (1976).

Under the Supreme Court's opinion in Lovett, an order of the type imposed here by the S.E.C. is an unconstitutional bill of attainder. That holding in turn relied on the landmark case of Cummings v. Missouri, 71 U.S. (4 Wall) 277, 321-322 (1866) where the court stated:

> "...in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights we are all equal before the law. Any deprivation or suspension of these rights for past conduct is punishment, and can be in no otherwise defined."

The lifetime bar imposed on Sloan in the instant case is clearly the depraciation or suspension of a right for past conduct and hence is punishment. However, under United States v. Lovett, supra any proceeding which places a person in jeopardy of being punished must be conducted in accordance with the provisions of Article III and Amendment VI of the Constitution governing criminal trials. Since the S.E.C. did not conduct a criminal trial or give Sloan the rights a criminal defendant must be given, the penalties imposed by the S.E.C. must be set aside.

The brief for the S.E.C., p. 37, brushes aside this argument by stating:

"Petitioner would have this Court upset over fourty years of administrative law by requiring that the decision whether a person may remain registered as a broker-dealer be determined in the first instance by a judge appointed by the president and approved by the congress ..."
The short answer to this argument is that assuming what the S.E.C. has been doing is unconstitutional, the length of time it has been doing it is irrelevant. For example in the opinion in the instant case, this Court upset a thirty year S.E.C. tradition of taking on one ten day suppression order to another, a procedure the S.E.C. authorized itself to do. In the Matter of Red Bank Oil Co. 21 S.E.C. 695, (1945-47 CCH transfer binder) par. 75,610.

Apparently the only time the constitutionality of S.E.C. administrative proceedings has ever been considered by any court came in Wright v. S.E.C., 112 F.2d 89 (2d Cir. 1940). That decision predates United States v. Lovett, supra and its progeny and should be reconsidered and upon reconsideration should be overruled particularly since the principal holding of Wright, which that the "public interest" standard was sufficiently definite, has now been overruled by the Supreme Court in F.E.A. v. Algonquin Sng., Inc., --U.S.--, 49 L.Ed.2d 49, 58 N.10 (June 17, 1976) which explained that Congress may not delegate to an administrative agency the authority to decide what is in the public interest.

POINT IV

THIS COURT IS IN ERROR IN ITS FAILURE TO REVIEW THE FACTS AND THE EVIDENCE ADDUCED IN THIS CASE.

Customarily, formal judicial opinions commence with a statement of facts, if for no other purpose than to give the reader an idea of what the case is all about. However, the opinion handed down here does not do so beyond an opening sentence which states that this is Samuel H. Sloan's "latest maneuver." The opinion then

plunges into a discussion of various legal arguments advanced by Sloan without giving the slightest hint of the factual context in which they were presented. It is submitted that were the facts stated, it would be apparent that Sloan's legal arguments were correct.

For example, this court rules that Sloan received adequate notice of the charges against which he had to defend himself. Slip op. at 558. However, it does not state what those charges were. The petitioner contended in his brief not only that the initial order for public proceedings fail to inform him as to the nature and the cause of the accusations against him, but that he was forced to defend against continually shifting theories of prosecution of this case, theories which continued to shift even with the filings of briefs in this Court.

If the court is correct in its ruling that Sloan received adequate notice, then it would be a seemingly simple thing to set forth what the S.E.C. accused Sloan of doing, what evidence was adduced at the hearing, and what the S.E.C. found based upon this evidence. If, however, Sloan is correct and he still does not have a reasonable basis for knowing what he is accused of doing, then the Court would have difficulty in providing much more factual information than it has provided here.

Any discussion of the facts of this case must necessarily lead into consideration of various legal issues raised by the petitioner. However, a detailed analysis of these points will not be made here since a petition for a rehearing does contemplate a reargument of all the legal issues which were raised previously,

particularly if only a few of them were passed upon. Nevertheless, it will be said that the principal argument advanced by the petitioner, to which he devoted about two thirds of his brief was that the findings of the S.E.C. were not supported by substantial evidence. The opinion of this Court in the section which deals with this case does not mention the term "substantial evidence" even once. It is submitted that the failure to consider the evidence and the record of this case is in itself reversible error.

The Court sidesteps the question of the sufficiency of the evidence by stating that the injunctions in themselves were a sufficient ground to support the broker dealer revocation. However, the validity of those injunctions still has not been finally decided. The question of whether this Court properly dismissed Sloan's appeal at 538 F.2d 313 (2d Cir. 1976) is presently pending before the United States Supreme Court in a petition for a writ of certiorari, Docket No. 76-365. Moreover, the preliminary injunction obtained by the S.E.C. in the second injunctive suit, which this court relies upon, was vacated prior to trial and the case was dismissed as moot by Judge Ward on August 18, 1976. In addition, in yet another opinion which this Court cites, S.E.C. v. Sloan, 535 F2d 679 (2d Cir. 1976) a petition for a rehearing and a suggestion that the rehearing be in banc has been pending since June 3, 1976 without decision.

All of this adds up to a rather shaky decision which could become unhinged by a ruling by another court or another panel of judges. The penalties which have been imposed upon Sloan are so severe that they should not hang on such a flimsy basis. Therefore, this petition for a rehearing should be granted and upon rehearing

the decision should be reversed.

The petitioner further suggests that the rehearing be in banc. This case presents questions of obvious importance which have not been previously settled and which are likely to affect the outcome of many other cases. Moreover, all but two of the active judges of this Court have heard at least one of a series of related cases of which this is a past and therefore a rehearing en banc is appropriate.

CONCLUSION

This petition for a rehearing and suggestion that the rehearing be en banc should be granted.

Respectfully submitted,

SAMUEL H. SLOAN
Bronx, N.Y.

Dated: Nov. 29, 1976

SLOAN

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 2 day of Dec. 1976 deponent served the within Petition upon

General Counsel, Securities & Exhhange Commission
Att. Frederick B. Woode, Esq.

attorney(s) for

Respondent

in this action, at

Washington, D.C. 20549

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 2 day
of Dec. , 1975~~x~~ 1976

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978